BASIS STATEMENT
July 13, 2013

The definition of "aggrieved person" was amended in response to Resolve 2011, c. 144 which directed the Board of Environmental Protection to adopt rules to conform the standards for standing to appeal a Commissioner's licensing decision to the Board to the standards for standing to appeal a decision of the Board to court. The Legislature's Joint Standing Committee on Judiciary held a public hearing on the provisionally adopted rule on May 7, 2013. The Legislature did not make any changes to the provisionally adopted rule and in Resolve 2013, chapter 65, the Legislature authorized final adoption of the rule. The Board finally adopted the rule at its meeting on July 18, 2013.

Supplemental Basis Statement and Response to Comments
Chapter 2, Section 1(B) Definition of "Aggrieved Person"

List of Commenters

1. Philip Ahrens, Esq. (orally at hearing)
   Pierce Atwood
   Merrill's Wharf
   254 Commercial Street
   Portland, ME 04101

2. Charles Leithiser (orally at hearing, and written comment dated 11/13/2012)
   394 Fourth Street
   Old Town, ME 04468

3. Richard Sirois (orally at hearing)
   255 Frederick's Corner Rd
   Norridgewock, ME 04957

4. Edward S. Spencer (orally at hearing, written comment dated 11/11/2012)
   P.O. Box 12
   Stillwater, ME 04489

5. Paul Schroeder (written comment dated 10/31/2012)
   13 Hamlin Street
   Orono, ME 04473

6. Ivy Frignoca, Esq. (orally at hearing, written comment dated 11/1/2012)
   Conservation Law Foundation (CLF)
   47 Portland Street, Suite 4
   Portland, ME 04101

7. Jennifer Burns Gray, Esq. (written comment dated 11/8/2012)
   Maine Audubon
   20 Gilsland Farm Road
   Falmouth, ME 04105

8. Nancy McBrady, Esq. (written comment dated 11/13/2012)
   PretiFlaherty
   P.O. Box 9546
   Portland, ME 04112

Summary of Comments Organized by Issue

Clarification of Intent

- Commenter #1 testified in support of the proposed amendment to the definition of "aggrieved person;" however, the commenter stated that the language should be more direct. Rather than stating that it is the Department's **"intent"** to interpret and apply the term consistent with the courts, the rule should state that the Department **"will"** interpret and apply the term consistent with the courts.

  Response:
  The Board agrees that this proposed amendment would eliminate any possible ambiguity caused by the use of the word "intent," and therefore has made the change for the sake of clarity.

Particularized Injury

- Commenter #8 commented that the revised definition is contradictory: the use of the term "may suffer a particularized injury" is more broad and inclusive than the definition articulated by Maine courts. The commenter argued that to acquire standing, a person ***must*** demonstrate a particular injury and the agency's action ***must*** operate prejudicially and directly upon a party's property, pecuniary or personal rights. The commenter recommended deleting the first sentence of the proposed definition, or changing the **"may"** to **"will."**

- Commenter #6 argued that the existing definition in Chapter 2, "may suffer particularized injury" is consistent with the Law Court's interpretation of administrative standing over the past four decades. Commenter #7 supports this view.

  Response:

These conflicting comments illustrate the difficulty the Board would have if it were to attempt to incorporate into its rule a comprehensive and precise statement of the test Maine courts use to determine judicial standing. As Commenter #8 observes, most Law Court cases speaking to the issue indicate that a petitioner must show that the challenged decision ***will*** *cause injury, see, e.g., Norris Family Associates, LLC v. Town of Phippsburg, 879 A.2d 1007, 1012 (Me. 2005); or that the decision* ***has already*** *caused injury, see, e.g., State v. Collins, 2000 ME 85 ¶ 6, 750 A.2d 1257 (Me. 2005). However, as Commenters #6 and #7 point out, other cases state the test as requiring only a showing of "potential injury," see, e.g. Anderson v. Swanson, 534 A.2d 1286, 1288 (Me. 1987); In re Lappie, 377 A.2d 441, 443 (Me. 1977). In light of this, the use of the term "may" in the rule is not necessarily inconsistent with Maine case law governing standing, since the case law itself contains slightly different formulations of the test depending on the circumstances. Therefore, no change has been made to the rule.*

Although Commenter #8 is correct that the Board has historically interpreted its definition of "aggrieved person" as being more permissive than the judicial standard, the amendment that the Board adopts today pursuant to Resolve 2012 c. 144 clarifies that it will no longer do so. With the adoption of this amendment, the Board will determine standing using the same principles as Maine courts.

Standing should be Liberally Construed

- Commenters #2, #4, #5, #6, and #7 argued that standing to appeal should be liberally construed in environmental cases. Commenters #2 and #4 argued that environmental cases are by nature generalized and that the courts have found that injury to the environment is sufficient to support standing to persons who use the affected environment.

  Response:
  The Legislature has directed the Board to conform its test for determining standing to the test that Maine courts employ for the same purpose. Under certain circumstances, Maine courts construe standing liberally. See, e.g. Grand Beach Ass'n v. Old Orchard Beach, 516 A.2d 551, 553 (Me. 1986) (describing requirements for abutters to establish standing). Where courts construe standing liberally, so too will the Board.

  The concept that an appellant may establish standing based on environmental harm to an environment that the appellant uses or enjoys in a manner that is distinct from the general public is recognized in Maine case law. Fitzgerald v. Baxter State Park Authority, 385 A.2d 189, 196 (Me. 1978); In re International Paper Co., Androscoggin Mill Expansion, 363 A.2d 235 (Me. 1976). The Board will therefore review questions of standing consistent with that principle.

- Commenters # 2 and #4 argued that the requirements for standing to appeal may differ depending on the purpose of the administrative agency and the interest the

agency was created to protect. The Board should retain its discretionary power to determine standing in line with the agency's and Board's mandate. Commenter #5 cited an example where the question of standing cannot be readily separated from an analysis of the factual evidence at issue in the appeal and a weighing of the plausibility of competing claims.

Response:
This change to the rule will not deprive the Board of discretion over how it resolves the standing issue in the cases that come before it. Courts regularly exercise discretion in their approach to questions of standing. For example, the manner in which parties are required or allowed to address standing, both through the submission of evidence and the presentation of argument, will be subject to the Board's discretion. The Board may determine that a threshold ruling on standing makes sense in some cases, while in others the question may be better resolved alongside the merits of the appeal. In certain cases in which the question of standing is so factually intertwined with the merits, or the appeal may be denied more easily for reasons other than standing, the Board will have the discretion never to reach the issue. Collins, 2000 ME 85 ¶ 11-14, 750 A.2d 1257 (concurring opinion of Justice Caulkins); see also Norton v. Mathews, 427 U.S. 524, 532 (courts may "reserve[e] difficult questions of jurisdiction when the case may alternatively be resolved on the merits in favor of the same party.") Just as is true for courts, the Board's handling of standing questions will not be rigid or mechanical, but responsive to all the circumstances associated with a particular case.

Undue Burden on Appellants and Board

- Commenters #2, #6 and #7 expressed concern that the proposed language change places an undue burden on someone seeking to appeal a Commissioner's licensing decision and would likely have the effect of requiring potential appellants to retain lawyers when faced with challenges to their standing, effectively shutting citizens [who cannot afford counsel] out of the process. Commenter #3 testified on his experience appealing a license decision.

  Response:
  The Board is acutely aware of the need to keep its proceedings open and accessible to Maine citizens, including particularly those acting without legal counsel. This amendment to the Board's rule should not operate as a new impediment to unrepresented parties. The first sentence of the "aggrieved person" definition is not being changed, and parties have worked with that sentence without difficulty for many years. Fundamentally, the question of standing simply requires a showing of how the challenged decision may harm the appellant in some way that is distinct from the general public. Parties will be able to address that question in the same way they always have, with or without legal counsel.

- Commenter #5 argued that the proposed language places an "unmanageable burden on the Board and its staff" and the judgment and discretion now exercised by the

Board will be replaced by an analysis of legal briefs on the matter and a determination by the Office of the Attorney General. The Board needs to retain its discretionary power.

Response:
The Board's standing decisions have always been substantially influenced by how Maine courts have approached the same question, even if the Board did not regard itself as formally bound by those decisions in the manner that will now be true. And the Board has always worked closely with the Attorney General's Office to resolve questions of standing. Therefore, the incorporation by reference of Maine case law governing the issue will not represent a dramatic change in Board practice.

Language is too Vague

- Commenters #6 and #7 argued that the proposed language is too vague and does not allow its application in a transparent and consistent manner. They argued that the rule should provide more direction to decision-makers; otherwise, this will become a lawyer driven process with filing of briefs on the question followed by AG analysis. Commenter #6 proposed (and Commenters #4 and #7 support) the following alternative language which the commenter argues is supported by cases *Lappie,* 377 A.2d at 443; *Anderson*, 534 A.2d at 1288; and *Nergaard v. Town of Westport Island*, 2009 ME 56, ¶ 18, 973 A.2d 735.

  > "Aggrieved person" means any person whom the Board determines may suffer particularized injury as a result of a licensing or other decision. A particularized injury occurs when the licensing or other decision adversely and directly affects or in the future may affect a party's property, pecuniary or personal rights. Consistent with Maine law, the Board will not require a high degree of proof of a particularized injury, and will liberally grant administrative standing."

  Response:
  The Board cannot accept this proposed definition. First, as noted above, Maine courts have set forth different formulations of this standard in different cases depending on the circumstances. For example, the principle that only a minimal showing is required to establish standing appears in cases involving claims of standing by abutters or property owners in the same "neighborhood." Nergaard, 2009 ME 56 ¶ 18; 973 A.2d 735; Roop v. Belfast, 2007 ME 32 ¶ 8, 915 A.2d 966. It is not a generally applicable doctrine in the law of standing. Moreover, adding language to the effect that the Board "will liberally grant administrative standing" would suggest that the Board will subject its administrative standing determinations to a different and more permissive test than courts apply to judicial standing. The Legislature directed exactly the opposite.

Language is too Broad and could Impact other Provisions of Law

- Commenter #6 stated that the proposed language likely "exceeds the bounds of the Resolve by extending application of the definition to other provisions of statute or rule." The Commenter did not identify another statute or rule which the Commenter thought would be impacted by the proposed change to the definition of aggrieved person.

  Response:
  The term "aggrieved person" appears in DEP statutes and rules to describe who is eligible to appeal the agency's decisions, which was the concern of the Legislature in enacting Resolve 2012, c. 144. The amendment to the rule will have meaning only within that context, consistent with legislative intent.